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HOW THE ENGLISH CHASED THE AMBULANCE CHASER.

When it existed in England, they called it "running-down actions." Just why our cousins so described the energetic gentry who once sat upon the hospital steps, sent flowers to "prospects" and had co-conspirators to write effusively to the injured of their "fine qualifications" as "damage suit" lawyers, excites the curiosity only. The English ambulance chaser is as extinct as the dodo. It is proposed to describe how this festering sore was cut from the body of English juristic activities with the hope that a splendid example will be emulated in America. What is to be said will prove as interesting to active charity workers as to the judge and lawyer. A description of the activities of "ambulance chasers" would be surplusage, since the breed is the same wherever it flourishes and its mode of depredating upon the helpless or ignorant was about the same in England as it is in America.

As soon as the Judges of England were set free, by the adoption of rules of court, to exercise their God-given discretion and good judgment, one of the first things they did was to stop abuses, committed by a few bad lawyers, it is true, but abuses that had reflected upon the good name and intent of the Bench and Bar, and that tended to lower the high ethical standing of a noble and necessary profession. The first offender, because he was the most flagrantly wicked, to feel the restraining hand was the "ambulance chaser." It required several efforts, as will now be shown.

The life of the ambulance chaser depends upon money—"damage money." The famous Order XXII, Rule 15, promulgated in 1883, therefore went to the heart of the problem when it took away from them, and placed under the control of the judges, all money recovered in any trial court by an infant or by a "person of unsound mind not so found by inquisition." Instead of paying the proceeds to the "counsel in the case" or to some other person, the judge was empowered to pay reasonable compensation and to direct the disposition of the balance. This he did by causing the defendant to pay it into Court, to be invested or otherwise used, both as to principal and interest, in the sound discretion of the judge. Upon becoming *sui juris* the beneficiary was entitled to receive the money.

On account of the manner of selection, compensation and retirement, of which we shall later speak, there is no such thing as a corrupt or incompetent judge in England, though there may be some arbitrary ones, for judges are human. The funds were, therefore, safe from dissipation. But, as will presently be seen, this point is immaterial, since the practical Englishman soon made the handling of these sacred funds a separate, and it became, a large business. However, in the meantime, the rule was discretionary and was not applied in every case, not only on account of the high standing of some counsel, but of the business ability of the next friend of the infant. In all instances, however, the court regulated the compensation to be paid to counsel, which is the crux of the problem.

Now the crafty "ambulance chaser," as might have been expected, soon set about discovering a way around this formidable barrier of the court. Order XXII, Rule 15, only authorized the judge to act "at or after the trial," but not *before the trial*. The more venal of the tribe promptly brought about a compromise of the case *without a trial* and thus circumvented the control of the judge over the fund and the compensation, whereupon the poor infant or "person of unsound mind not so found by inquisition" was, if possible, placed in a more unfortunate position than before. With

characteristic vigor the Rule Commission acted.

The first effort in 1905 to correct the weakness, by amending Order XXII, Rule 15, proved futile because, according to Samuel Rosenbaum, it "provided no means by which the court could interfere of its own motion." In 1909, another amendment seemed to have made it fairly operative, but the determination of the judges to wipe out the abuse may be inferred from the following amendments reported by Sir Willes Chitty (Yearly Practice 1921, p. 330). The former rule 15 (R. S. C., Aug., 1909, Rule 2) amended R. S. C., July, 1910, Rule 1, and July, 1912, Rule 1, was annulled and a new rule substituted therefor, dated May 20, 1914 (1914, W. N. Pt. II, p. 263). The sanction of a court or judge if required, before or after the trial, must be obtained *by a summons for the purpose.* At the trial it can be given by the judge and embodied in the Associate's certificate." Obviously the object of this precaution was publicity. It made a matter of record the reasons for surrendering the infant's money to counsel, or its parent, instead of to the Public Trustee. Little room was left for the possibility of arbitrary or lax judicial conduct. But let us have the rule itself which is in these words (Chitty, *supra*):

"In any cause or matter in the King's Bench Division in which money or damages is, or are claimed by, or on behalf of an infant or a person of unsound mind not so found by inquisition, suing either alone or in conjunction with other parties, no settlement or compromise, or acceptance of money paid into Court, whether before or at, or after the trial, shall, as regards the claims of any such infant or person of unsound mind, be valid without the sanction of the Court or a Judge, and no money or damages recovered or awarded in any such cause or matter in respect of the claims of any such infant or person of unsound mind, whether by verdict or by settlement, compromise, payment into Court or otherwise, before or at, or after the trial, shall be paid to the next friend of the plaintiff, or to the plaintiff's solicitor, unless the Court or a Judge shall so direct. All money or damages so recovered or awarded shall, unless the Court or a Judge shall otherwise direct, be paid to the Public Trustee, and shall, subject to any general or special directions of the Court or a Judge, be held and applied by him, in such manner as he shall think fit for the maintenance and education, or otherwise for the benefit of such infant or person of unsound mind."

As a natural sequence, funds rapidly accumulated in the registry of the courts, though that was not at all the object of the "anti-ambulance" project. It was a natural result of efficacious administration. Thereupon the practical English mind right away set about relieving the judges by creating a "Public Trustee" referred to above to administer all public funds, the safety of which was to be guaranteed by the government. It is analogous to the office of state or city treasurer, except that safety is assured in the States by a fidelity bond. This, of course, was done by an Act of Parliament and it was enacted in 1906 (6 Ed. VII, Ch. 55). This new official, while vested with the necessary power, did not at first take over the funds in the registry of the courts, for the careful judges wished for a demonstration of the practicability of the Trustee's work in so sacred a matter. In three years they were satisfied. In 1909, the Masters of the King's Bench Division (of whom we shall later speak) strongly commended the new office and its administration. The necessary amendment to the rules followed and is still the law. Funds now instead of being lodged in the registry of the court are paid into the treasury of the Public Trustee, under suitable direction.

The effect of its operation has been little short of marvelous. The Trustee makes an annual report, not only of his financial conduct, but of all his activities and the results. It was not convenient to obtain the latest report, but one given by Mr. Rosenbaum (p. 171) and taken from 59 Solicitors Journal, 408 (April 17, 1915) will suffice. "More than seven hundred such funds have been paid over to the Public Trustee, and

he has still in hand six hundred and fifty cases, the benefits belonging to upwards of one thousand infants!" Now, while the amount and number involved is impressive, the character of the work done and the number of dependent aided is more so. "It should," said Mr. Stewart (the Public Trustee) "be borne in mind that the greater number of these children are handicapped by physical injuries which are often of a permanent and serious nature. It will be realized that the exercise of the Public Trustee's discretion in each individual case, as regards the application of the money in such a way as to secure as far as may be the acquisition of a skilled trade or form of employment, such as to make them self-supporting before attaining their majority, and receiving the balance of their funds, is a matter of exceptional importance."

So, two commendable objects have been achieved, each of premier importance. The first is the complete wiping out of the "ambulance chaser" by depriving him of control over the funds of the ignorant and helpless from whom he took his ill-gotten gains. The second is the stable provision made for caring for and educating children and the helpless out of the very funds directed by law and intended by the jury to be paid by the defendant for that purpose. Could anything offer a stronger appeal to the American lawyer or the American charity worker?

The creation in America of a "Public Trustee" may not at first be necessary, but let us hope that funds will so increase as to demand the special service of such an official. But the control of the ambulance chaser is necessary. In the meantime, the American courts can see to the investment of the funds, as they do now, in thousands of other cases. There are some, but mighty few, bad judges in the United States. But the percentage in the number, as compared with the spawn of the ambulance chasers, is negligible. In the meantime, ambulance chasing will cease and the guilty will become respectable or leave the Bar; the maimed will receive their just due; the wiping out of unethical conduct will elevate the administration of justice and will purify the atmosphere about the courts. Last, the innovation will increase the faith of the people in their judges and lawyers. If it be possible in England to prevent ambulance chasing, by controlling the proceeds of judgments in damage suits, who is it that will face his people and say it is not possible in America?

THOMAS W. SHELTON.

NOTES OF IMPORTANT DECISIONS.

PROOF REQUIRED TO SHOW THAT VEHICLE USED IN ILLEGALLY TRANSPORTING LIQUOR WAS USED WITHOUT OWNER'S KNOWLEDGE IN ORDER TO AVOID A FORFEITURE.—The federal courts are kept busy condemning automobiles used for the purpose of illegally transporting intoxicating liquor. Many people have not learned that to lend a friend one's car to transport liquor is to lose the car. And the burden of proving an absence of intent that the car shall be so used is upon the owner of the car. In the recent case of United States v. One Shaw Automobile, 272 Fed. Rep. 491, the District Court (N. D., E. D., Ohio) held that an owner of an automobile, seized while illegally used for the transportation of liquor, does not show good cause why it should not be forfeited, unless he not only proves clearly and satisfactorily that it was used without his knowledge and consent, and in excess of any authority conferred by him on the person using it, but also removes any imputation of negligence by intrusting the vehicle to another under circumstances from which a reasonable person would have foreseen it was to be illegally used.

The strange thing about this case is that the automobile belonged to a taxi company and the only evidence of the intent of the company that its machine should be used in transporting liquor was that a call was received from a customer to send a taxi to a certain saloon in Pittsburg to take certain parties thence to Cleveland. The company's agent made no inquiries as to the character of the trip and

did not know that certain sacks put in the car contained liquor. The Court said:

"I do not hold that an automobile livery is to be held liable in all cases, if a driver, contrary to instructions, devotes one of its cars to the illegal transportation of intoxicating liquor. In the instant case, the facts and circumstances are that the owner's dispatcher or superintendent sent its driver to premises used for saloon purposes; that he permitted the driver, after being informed that the car was destined for Cleveland, to engage in that enterprise without inquiry or investigation; that full authority was conferred on the driver to engage or refuse to engage in the enterprise, using his own judgment as to whether the transaction was legal or illegal; and that no precautions were taken at any time to ascertain whether or not the transaction was legal or illegal. The distance to be traveled each way is approximately 150 miles. The expense of a round trip, at 40 cents a mile, would be approximately $120. It is difficult to believe that this is a simple, ordinary transaction in the usual course of business. It was then a matter of public notoriety that whisky was being transported, not only in suit cases and trunks upon railway trains, but upon the public highways in automobiles and trucks. To exonerate the owner on a showing merely that instructions had been given to its drivers not to engage in the illegal transportation of intoxicating liquors, notwithstanding the drivers were intrusted with full authority to decide whether the transaction was legal or illegal, would open wide the door to collusion and evasion of the law."

THE RIGHT OF A STATE TO REFUSE RECOGNITION OF A FOREIGN DIVORCE DECREE.—As to decrees of divorce, where only one of the parties is before the court, the states of this Union are as foreign to each other as each is to Japan or China or England, or any other foreign land. This is the ridiculous and intolerable situation created by the Supreme Court in the Haddock case, one of the most puerile opinions ever handed down by that honorable tribunal. Under that decision the states, if they see fit, on mere principles of comity, and not on any constitutional obligation to render due faith and credit to the judicial decrees of a sister state, may recognize a decree of divorce based on substituted service or may utterly ignore it and proceed against the spouse securing the divorce as if the decree had not been rendered and subject him and his estate, as well as other persons or innocent children who have rightfully assumed or acquired family relationship with him, to personal shame and pecuniary loss. For some time New York was the only state that took advantage of the deplorable blunder of the Supreme Court, but now Massachusetts falls in line and holds that a former wife living in Massachusetts, but divorced in Illinois, may enjoy a widow's share in the deceased former husband's estate. Parmelee v. Hutchins, 131 N. E. 443.

In this case there was no question as to the bona fides of the husband's domicile in Illinois. He went there on business without intending to secure a divorce. Before his removal to Illinois his wife had separated from him on what she thought was proper grounds. After living in Illinois for several years, the husband secured a divorce on substituted service, which so far as the opinion of the Massachusetts court shows was perfectly valid in Illinois. The Massachusetts court says something about a valid defense to husband's petition which the wife could have made if she had known of the proceedings. But this, it seems to us, is wholly beside the mark. The question is, Did the Supreme Court of Illinois render a decree binding and valid in Illinois? If so, why should it not be binding in Massachusetts? If this is not true, then the United States is no longer a nation, so far as the question of divorce is concerned, but is simply a bundle of states very loosely tied together. The opinion of the Massachusetts court is a mere shameless reliance on the Supreme Court's *faux pas* in the Haddock case, and offers no apology or excuse for ignoring the Illinois decree. The Court said:

"The court of Illinois not having matrimonial jurisdiction and not having jurisdiction of both parties, could not make a decree which would fall within the full faith and credit clause of the Constitution of the United States (Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794; Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1; Thompson v. Thompson, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. Ed. 347). But other states, if they see fit, on principles of comity, may recognize a foreign decree of divorce when such decree has no extraterritorial force by reason of Art. 4 of the Constitution of the United States (Haddock v. Haddock, *supra;* Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841, L. R. A. 1917B, 1028)."

The widow in this case, it should be noted, did not reap the result of the court's reasoning, for she married after learning of the divorce granted to her husband in Illinois. In accordance with the familiar rule that a remarriage with knowledge of the fact estops the party entering into it from denying the validity of the previous divorce, the Supreme Court was compelled to hold that she could not take advantage of the invalidity of the Illinois decree of divorce.

DECLARATORY JUDGMENTS*

If the parties could find out their rights before acting, their action would conform most frequently to their rights. If counsel had means of knowing with reasonable certainty the rights of their clients, their clients would be saved loss by acting within their rights. It is an accepted principle that the courts' aid may not be invoked until a wrong is committed nor unless the judgment is to be enforced by process for immediate relief. The principle is tersely stated in Woods v. Fuller:[1]

"A court of equity will not take jurisdiction unless it can afford immediate relief. * * * It must be borne in mind that the decree of a court of equity, and not its opinion, is the instrument through which it acts in granting relief. However sound and clear such opinion may be, as an abstract proposition of law, yet if the principle it declares can not be carried into effect by a decree, in the case in which it is given, it is wholly valueuess, and an idle and nugatory act."

The courts have "refused to allow parties to appear in court, except under conditions which permit a display of force by the judicial arm of the state."

The wisdom of such condition of the law is well doubted and there is a persistent effort to give relief to those who have controversies without the necessity of legal combat incident to the ordinary lawsuit.

In an interesting and able paper read before the Tennessee Bar Association (1920) by Mr. Gates, the principle is thus stated:

"It has been urged, and I think wisely, that frequently parties desire to obtain a mere declaration of right without seeking the coercive relief to which they might be entitled, and that such a procedure psychologically makes for better understanding between business men. I think we can readily appreciate that ordinarily parties to contracts would much prefer a mere declaration of their rights thereunder than to await a breach and the seeking of coercive relief by one or the other. The antagonisms that are engendered in a bitterly fought lawsuit usually leave their scars. On the other hand, there is probably less bitterness occasioned in a proceeding in which the court is called upon to merely settle disputes or misunderstandings between parties over the construction of the contract or over the relative rights of the parties. It would enable the profession to remove the uncertainty and the doubt from matters that are being presented constantly to it. It would enable a party to obtain a determination of his rights without waiting for the other to become the aggressor. And there are many other arguments that may be advanced on behalf of this new departure."

And Prof. Sunderland, of Michigan University,[2] announces the principle thus:

"Every case may by this means become in appearance, at least, a friendly suit. There is no doubt that the personal animosities developed by litigation are serious drawbacks to the usefulness of the courts. To sue is to fight, and fights make endless feuds. Parties hesitate to resort to the courts because they shrink from a state of war with their neighbors or business associates. * * * When you ask for a declaration of right only you treat him as a gentleman."

Declaratory judgments in one form or another have been authorized in the English Courts beginning with 1859. In that year the practice of the High Court of Chancery was amended so as to provide that "no suit in the said court shall be open to objection on the ground that a mere declaratory decree or order is sought thereby and it shall be lawful for the court to make binding declarations of rights without granting consequential relief.[3]

In 1873 the Judicature Act was passed and in 1883 Rule 5 of Order 25 was

*This article by Judge Gordon will be found interesting as constituting a resume of recent discussions of this important reform of judicial procedure.—Ed.

(1) 61 Md. 457.

(2) 54 American Law Review, No. 2, p.173.

(3) 15 and 16 Vic., chap.86, sec. 50.

promulgated and it provided: "No action or proceeding shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not." It will be observed that in this provision the remedy is not confined to the Court of Chancery.

The State of Rhode Island,[4] adopted a provision as follows:

"No suit in equity shall be defeated on the ground that a mere declaratory decree is sought; and the court may make binding declaration of right in equity without granting consequential relief."

And later, by statute it is provided as follows:

"Subject to rules any person claiming a right cognizable in a court of equity under a deed, will or other written instrument, may apply for the determination of any question of construction thereof, in so far as the same effects such right, and for a declaration of the rights of the persons interested."

And in the State of Connecticut, General Statutes 1918,[5] provides:

"An action may be brought by any person claiming * * * any interest in * * * real or personal property * * * against any person who may claim * * * any interest * * * adverse to the plaintiff * * * for the purpose of determining such adverse * * * interest and to clear up all doubts and disputes and to quiet and settle the title to the same."

The English Act is set out, with notes and citations of cases under each section, in Central Law Journal, Volume 91, page 264. In that article it is said:

"The American Bar Association at its last session in St. Louis on August 27, 1920, after an interesting debate and under the persuasive eloquence of Mr T. J. O'Donnell, of Denver, Colo., and Hon. Charles E. Hughes, of New York, voted in favor of a resolution asking Congress to grant to the federal courts jurisdiction to 'declare' the rights and other legal relations on written request for such declaration, whether or not further relief is or could be claimed, and such declaration shall have due force of a final judgment'."

There seems to have arisen in the last few years a new interest in the principles set out in the English Act and applied in the English cases based upon the Act, so that we have legislation in several States on declaratory judgments—Michigan Act 1919, Wisconsin Act same year, Florida Act the same year, Kansas Act 1921.

At the last Conference of Commissioners on Uniform State Laws, held in St. Louis, August of last year, at which nearly all of the States of the Union were represented (Kentucky, I regret to say, being one of the few not so represented), the Commission had under consideration the principle of declaratory judgments. An interesting report was made and a tentative draft of a law to be submitted to the several States was approved by the commission and passed to the next session, which meets with the American Bar Association at Cincinnati in August of this year, for revision and review.

An able article reviewing this tentative draft, together with citation of authorities by Prof. Edwin M. Borchard of Yale, will be found in the Harvard Law Review.[6]

There have been many adjudications under the declaratory judgment enactments. The practice has grown in favor in the English courts. In one volume of the reports for the year 1919 it is noted that over half the cases reported were declaratory judgments, and in a volume for 1917 an examination of the cases decided on appeal discloses that sixty-seven per cent were declaratory actions. This of course, takes no note of the vast number of cases that were decided in the lower courts and not appealed, and it has been said that it may be fairly assumed

(4) General Laws 1909, chap. 289, sec. 19.

(5) Sec. 5113.

(6) May, 1921, vol. 34, No. 7, p. 697.

that the lower court decisions were more numerous in proportion because it is reasonable to suppose that declaratory actions are less likely to be appealed than cases where coercive judgments are rendered.

In this article it is possible to select and note only a few cases illustrating the principles of the declaratory judgment.

In Zinc Corporation v. Hursch,[7] there is a declaration that a contract by an Australian firm to supply their whole output of zinc to a German resident in Germany was wholly dissolved by the declaration of war and not merely suspended, so that the Australian knew he was free to dispose of his product as he saw fit.

In Stevenson v. Aktiengesellschaft[8] there was a partnership between an Englishman resident in England and a German resident in Germany for the manufacture in England of a certain article. The profits from the manufacture of this article rose materially after the outbreak of the war, and the Englishman desired to know what the rights of his German partner were in those war profits. He obtained a declaration that the partnership with an alien enemy was completely dissolved upon the outbreak of the war and that the enemy had no share in the profits subsequently earned. Of course, it would follow that he was liable for no losses.

Most English leases contain a clause requiring the lessor's consent to sublet, but providing that such consent should not be unreasonably withheld. Very frequently a lessor will attempt to impose unreasonable conditions upon giving consent, such as increased rent or a money payment, and the lessee will then bring an action asking merely for a declaration that the landlord's consent is being unreasonably withheld. Such a declaration was made in Young v. Ashley Gardens,[9] where Cozens-Hardy, L. J., said:

"If we refused a declaration here the lessee's property would diminish in value, as his assignee would run the risk of being turned out by the lessor. I cannot imagine a more judicious or beneficial exercise of the jurisdiction to make a declaratory order."

In the case of Societe Maritime v Venus S. S. Co;[10] the facts are: A contracted with B to load 75,000 tons of ore a year on B's ships for a period of years. When the contract had still 1½ years to run, C informed A that B had assigned his contract to C and that C would claim the benefit of it. C tendered a ship to be loaded and A refused to load it. A then brought an action for a declaration that he was not bound to load C's ships under the contract with B. Channell, J., in giving judgment, said:

"In reference to a mercantile transaction of this sort parties are entitled now to come into court and say, 'It is important to us in reference to this contract, which has a year and a half to run, to know whether we are bound by it or not.' * * * They are not entitled to come and ask a court of law for an opinion upon a speculative or academic question; but showing the necessity of a decision upon it, I think they are entitled to a declaration as to whether or not the contract is binding upon them. They are not bound at their peril to refuse to perform it and then to be liable for heavy damages for not performing it for the space of the next year and a half."

In Thompson Bros. & Company v. Amis,[11] a dispute arose between the parties over the proper construction of the contract of employment whereby the plaintiffs employed the defendant. The defendant by way of compensation was entitled to receive a sum equivalent to a certain share of the net divisible profits of the firm. The plaintiffs sought to deduct from the return for excess profits made by them the real remuneration paid to

(7) 1 K. B. 541.
(8) 1916, 1 K. B. 763.
(9) 1903, 2 chap. 113 C. A.
(10) 9 Commercial Cases 289 (K.B.D., 1904).
(11) 1917, 2 chap. 211.

the defendant. This the surveyor of taxes declined to allow. The plaintiffs gave notice of an appeal. The defendant insisted upon a settlement under his contract. Thereupon the plaintiffs sought a declaration that they were entitled to recover from the defendant as and when the return was paid, by way of excess profits duty in respect of the increased remuneration of the defendant for the period in controversy. A declaration was made as required. In other words, the question with which the parties were confronted was whether or not the manager's additional compensation ought to be estimated before or after the deduction of the excess profits tax. The plaintiffs were not obliged to wait until there had been a demand made on them by the manager for the larger compensation, but obtained from the court a declaration as to the proper basis of computation.

In Mayor of Bayonne v. East Jersey Water Company,[12] the city of Bayonne had a contract with the New York and New Jersey Water Company to supply it with water and the latter company in turn obtained its water from the East Jersey Water Company. The New York and New Jersey Water Company sold its plant and assigned its contract with the East Jersey Water Company to the city of Bayonne. Immediately thereafter the East Jersey Water Company notified the city that at the expiration of a certain date it would no longer supply the city with water, assigning as reason therefor that it had no contract with the city and that the assignment of the New York and New Jersey Water Company relieved it from further liability. Thereupon the city filed suit for an injunction and a declaration of rights. And out of this arose three questions for determination: (1) Did the purchase by the city terminate the obligations of the East Jersey Water Company; (2) If not ended by the purchase, will it end on September 6, 1919; and (3) if not terminated by the purchase or if it does not terminate on September 6, 1919, but continues until June 21, 1929, is the East Jersey Water Company under any obligation to supply Bayonne with water after that date, and if so, then is its obligation to supply water only for municipal purposes or also for resale to outside consumers? And the court proceeded to settle the rights of the parties under the contract, not only the right to an injunction presently, but adjudged the rights, some of which would only arise in the future. Through this means a complete disposition was had, once for all time—all of the matters in controversy being judicially settled and all doubts or questions of construction that might arise over the contract resolved, and the parties knew what their respective rights and duties were.

The Michigan statute was held unconstitutional in the case of Anway v. Grand Rapids Railway Co.[13]

Anway was a conductor employed by the Grand Rapids Railway Company. The statute prohibited the employment of such employes more than six days in the week, except under certain conditions of emergency, and fixed a penalty. Anway desired to work more than six days in the week, and the railway company desired to employ him more than six days. Anway instituted his action seeking a declaratory judgment that if the railway company should employ him to work more than six days in the week that it would not be a violation of the law, in effect holding unconstitutional the Act against such employment. A labor union, of which Anway was not a member, interpleaded and contended that the statute should be construed to prevent plaintiff from working more than six days in the week. From a declaratory judgment up-

(12) 108 Atl. 121.

(13) Michigan Supreme Court, Sept., 1920; 179 N. W. Reporter, 305, 211 Mich. 592.

holding plaintiff's contention an appeal was taken to the Supreme Court. So much of the Michigan statute with reference to declaratory judgments above referred to, but not quoted, as was brought in question were Sections 1 and 3, as follows:

"Section 1. No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby and the court may make binding declarations of rights whether any consequential relief is or could be claimed or not, including the determination at the instance of anyone claiming to be interested under a deed, will or other written instrument of any question of construction arising under the instrument and a declaration of the rights of the parties interested."

"Section 3. Where further relief based upon a declaration of rights shall become necessary or proper after such declaration has been made, application may be made by petition to any court having jurisdiction to grant such relief for an order directed to any party or parties whose rights have been determined by such declaration to show cause why further relief should not be granted forthwith upon such reasonable notice as shall be prescribed by the court in such order."

The opinion reversing the case and holding the Act unconstitutional was by a divided court, the Chief Justice for himself and five of his associates holding the Act unconstitutional, and Judge Sharpe for himself and one other member of the court held to the contrary. The opinion concludes that the duties imposed upon the court under the statute are non-judicial in their nature; that the question in the case presented was a moot question; that the Legislature had no right to impose upon the court any duty not embraced in its judicial power; that it will not determine moot questions; that it is not an exercise of judicial power where a judgment rendered is not to be enforced by the court. It will be readily seen from the statement of fact that there was no controversy between Anway and the railway company and therefore it might well be said that the question was a moot question, and under this state of case the court could well have reversed and directed a dismissal of the petition. It was not necessary to decide the question of the constitutionality of the declaratory judgment statute in that case. No party to the record raised that question. The court, however, invited the Attorney General and Prof. Sunderland, who had written the very able argument above referred to, published in American Law Review,[14] entitled "The Courts as Authorized Legal Advisers of the People," to appear and brief the case. The court was manifestly unduly impressed with the title of that article by Prof. Sunderland and said in the course of the opinion that the courts should pause long enough to consider fully the constitutionality of the act before it should assume to become the adviser of three millions of people in the State of Michigan.

A large number of authorities are cited in support of the contention that the court will not decide a moot question. Those authorities, it seems to me, are not applicable to the question before the court. If there were no controversy between the parties appealing to the court, any decision of the court would be a decision of a moot question. It is further argued strenuously by the court in its opinion that it was without the power of the Legislature to impose upon the court the duty to decide questions that did not arise in a controversy between contending litigants, and further takes the position that unless the court in rendering the judgment is authorized also to give consequential relief that the question is not one that the court has jurisdiction to decide. In the minority opinion it is very properly said:

"Herein lies the distinction between the declaratory judgment and moot cases or advisory opinions. A declaratory judgment is a final one forever binding on the parties

(14) Vol. 54, No. 2, p. 161.

on the issues presented. The decision of a moot case is mere dictum, as no rights are affected thereby; while an advisory opinion is but an expression of the law as applied to certain facts not necessarily in dispute and can have no binding effect on any future litigation between the interested parties."

In criticism of the majority opinion it is said that the court does not recognize the distinction between a declaratory judgment which binds the parties and a mere advisory opinion or a decision of a moot case.

The majority of the court quoted liberally from the opinion in Muskrat v. United States,[15] and says:

"This case should forever put at rest this question. It is absolutely decisive of the question before us."

In the Muskrat case it appears that Muskrat and others, on behalf of themselves and other Cherokee citizens, were authorized to institute proceedings in the Court of Claims with a right of appeal to the Supreme Court.

" * * * to determine the validity of any Acts of Congress passed since said Act of July 1, 1902, in so far as said Acts, or any of them, attempted to increase or extend the restrictions upon alienation, incumbrance or the right to lease allotments of land of Cherokee citizens or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, and provided for in said Act of July 1, 1902."

The proceedings under that Act were instituted and brought to the Supreme Court, the court holding that the Act of March 1, 1907, above quoted, by which the Supreme Court was authorized to determine the validity of various acts having reference to the Indian tribes was in excess of legislative authority and that Congress had no power to confer power other than judicial power upon the court, or to require of it other than judicial action; that the proceedings there under consideration did not require the exercise of judicial power and ordered the dismissal of the proceedings. The Supreme Court said in that opinion:

"Judicial power is the power of the court to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision (Miller Const. 314.) The exercise of judicial power is limited to cases and controversies. Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution the power to exercise it is nowhere conferred."

It will be noted that in that case the parties whose interests would be affected by the decision of the Supreme Court were in large numbers not before the court and the statute imposing upon the court the duty to determine the rights of the parties was in effect the duty merely to pass upon the constitutionality of a congressional enactment without the parties being before the court. This the court held was beyond the power of Congress. As to the Muskrat case, ex-Justice Charles E. Hughes, now Secretary of State, in a supplemental statement to the recent report of the committee having the matter of declaratory judgments in charge, says:[16]

"It is true that the Muskrat case dealt with the validity of an Act of Congress, but the ground of the decision was the fundamental one that the judicial power extended to 'cases and controversies,' that is, that the judicial power was the 'right to determine actual controversies arising between adverse litigants duly instituted in courts of proper jurisdiction.' (219 U. S., p. 361.) It was not because the question was the determination of the validity of an Act of Congress, but because this question did not arise in an actual controversy, that the court found itself without power to determine it. Had there been an actual controversy, the question of the validity of an Act of Congress, or any other question properly brought before the court, could have been determined. But in the absence of an actual controversy, neither that question nor any other could be properly determined by the court. It was pointed out that the power

(15) 219 U. S. 346.

(16) Central Law Journal, Vol. 91, p. 435.

to decide upon the constitutional validity of a statue existed only when the court was called upon to determine an actual controversy. It was said that the whole purpose of the law there in question was to determine the validity of the class of legislation, not in a suit arising between parties concerning a property right necessarily involved in the decision, but in a proceeding against the Government in its sovereign capacity. The United States was to be made a defendant, but it had no interest adverse to the claimant's, the suit being brought solely to determine the validity of the legislation in question."

"I do not think, therefore, that it distinguishes the Muskrat case to say that it related to the determination of constitutional questions, for this fails to state the ground upon which the court found itself unable to determine the constitutional question. I think that the paragraphs relating to the Muskrat case should be changed, and particularly that portion which states the distinction between the Muskrat case and the proposed legislation. I do not think it should be said that probably legislation, conferring a power to determine the validity of an Act of Congress, should be within the rule in the Muskrat case. The question will be whether there is a 'case' or actual controversy,' and if there is not, it may be assumed that the statute would be held to be invalid whether or not it extended to the determination of the constitutional questions. The point of distinction, it seems to me, should be, and it is sufficient to state, simply that the proposed legislation is intended to deal only with actual controversies and proposes that where there is an actual controversy between litigants the court may render a declaratory judgment."

I think it a fair conclusion that where there is an actual controversy and the parties are before the court, the courts may determine such controversy under legislative enactment so authorizing, although consequential relief is not asked.

By comparing the sections of the Michigan Act with those of the Kansas Act, it will be observed that in the Michigan Act it is not expressly stipulated that the declaratory judgment is limited to actual controversies, while Section 1 of the Kansas Act, passed subsequent to the Michigan Act and after the decision in the Anway Case, begins "In cases of actual controversy."

Such judgments are now rendered by the courts without express statutory authority and without necessarily being enforced by process of the court, such as a judgment to quiet title, a judgment declaring marriages void or valid, a judgment construing wills or other written instruments, confirming the validity of municipal bond issues, a judgment directing an executor or trustee in administering his trust, a judgment on appeal by the appellate court in a criminal case reviewing the decisions of the trial court in admitting and rejecting evidence and in giving and refusing instructions in a case where there is a mistrial.[17] And in a case where there has been an acquittal the court can and will declare the law.[18]

A case worthy of note is Barth, Mayor, v. McCann, Police Judge,[19] In 1906 the question of closing the saloons on Sunday was acute in Louisville. Warrants had been taken out against various saloon keepers charging violation of Section 1303 of the Kentucky Statutes, providing:

"Any person who shall on Sunday keep open a barroom or other place for the sale of spirituous, vinous or malt liquors, or who shall sell or otherwise dispose of such liquors or any of them, shall be fined not less than ten nor more than fifty dollars for each offense."

McCann, police judge, sustained demurrers to the warrants on the ground that the statute was unconstitutional, amongst other grounds. The mayor, under the provision of the statute that it should be his duty to see that the ordinances and laws of the city were enforced, filed in the Court of Appeals his petition for a mandamus in the name of the Commonwealth in his official capacity as relator, seeking to have a writ issued against the police judge, compelling him to hear and try the writs. The defend-

(17) Commonwealth v. Matthews, 89 Ky. 287.
(18) Criminal Code. secs. 335, 336 and 337.
(19) 29 Ky. L. R. 707.

ant demurred to the petition, claiming that the plaintiff had no legal capacity to maintain the action and the court had no jurisdiction of the subject matter and the petition did not state a cause of action. The Court of Appeals held that it was McCann's duty as police judge to enforce the law, but denied the motion for a mandamus by an equally divided court, three of the judges being of the opinion that the court has the power under the Constitution to award the writ and three of them that it has not such power, and therefore the writ was denied; Judge Cantrill, then a member of the court, being ill and unable to act. Under this state of case the court, not being willing to issue the writ and, it seems, from sheer necessity, made a declaration as to the law and said:

"In view of the importance of the questions involved, we have expressed our views as above indicated, assuming when the judge of the city court in advised by this court that the statute is constitutional, it will be his pleasure to enforce the law and discharge his duty faithfully in upholding the mayor and police of the city in the efforts to do so."

The effect of the advisory opinion was that the constitutionality of Section 1303 of the statute and the right of the Commonwealth and of the city to have the statute and ordinances against the sale of liquor on Sunday enforced and the right to keep open saloons or sell liquor on Sunday were no longer undetermined questions.

A frequent confusion of decisions upon law questions is found. It is most difficult for counsel to advise his client as to what the courts will hold upon the state of case submitted to him by his client. He examines the authorities and may think that he finds decisions that will warrant him in advising his client and yet he knows that in taking his advice and acting upon it, the client takes a chance as to what the ultimate result may be. Mr. Bigelow, in his work on Torts,[20] says:

"What is meant by 'legal right'? The specific answer is whatever the judge, or judge and jury, in a particular case may decide. As a matter of fact, most cases in the higher courts are cases in which the judges must decide the questions of right. Such, indeed, is the complexity of human affairs that even 'natural' rights so called and rights already strictly defined may be drawn in issue so as to raise a question which must wait upon the decision of the judge in regard to the law."

How often a man will forego a claim of what he considers a legal right, rather than chance the decision of the court upon it after long and expensive litigation. A declaratory judgment would state the right in advance.

The declaratory judgment takes away no right of procedure now authorized. It rests within the sound discretion of the court to award it or not to award it. Of course, this discretion is a judicial, and not an arbitrary discretion.

The Michigan and the Kansas Statutes both state, it seems to me, the true ground for the declaratory judgment, that the statute shall be "liberally construed and liberally administered with a view of making the courts more serviceable to the people." Its discussion and consideration can well be made turn upon this principle. It should not be considered in the light of whether or not it will increase or decrease litigation. It is not evident that it will do either. The courts are created to administer justice in order to preserve the well-being of society. They are but instrumentalities created by the State for this purpose. The bar are officers of the court to aid the court in this high purpose, and I can well see that to declare the rights of parties before either has breached a right of the other would call for less work from the courts than to settle the disputes after the breach has occurred and losses on the one side or the other have been sustained.

THOMAS R. GORDON.

Louisville, Ky.

(20) 8th Edition, p. 4.

LIBEL AND SLANDER—PRIVILEGE.

McKENZIE v. WM. J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

183 N. W. 516

Supreme Court of Minnesota, June 24, 1921.

(Syllabus by the Court.)

The fact that the slanderous language was incidentally overheard by persons in an adjoining room was not such a publication as would remove it from the protection of the privilege.

TAYLOR, C. Action for slander in which the trial court directed a verdict for the defendant, and the plaintiff appeals from an order refusing a new trial.

Plaintiff had been in the employ of the Minneapolis branch of the defendant, and shortly after he left their employ defendant claimed that he had overdrawn his account, and sent for him to come to the office. He went to the private office of Mr. Rogers, the manager of the Minneapolis branch, where he found Mr. Rogers and William J. Burns, the president of the defendant corporation. He charges that in the controversy that ensued between himself on one side and Mr. Rogers and Mr. Burns on the other, concerning his account, Mr. Burns called him a "damn thief." Although Mr. Burns and Mr. Rogers deny that this language was used, there was sufficient evidence on the part of plaintiff to make this issue a question for the jury.

Plaintiff concedes, in effect, that the circumstances were such that the conversation between the parties during this interview and the communications then made were qualifiedly privileged. The statement having been made on a privileged occasion, plaintiff could not recover unless he proved actual malice on the part of Burns; that is, that Burns made the statement from ill-will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff. Peterson v. Steenerson, 113 Minn. 87, 129 N. W. 147, 31 L. R. A. (N. S.) 674; Hansen v. Hansen, 126 Minn. 426, 148 N. W. 457, L. R. A. 1915A, 104; Froslee v. Lund's State Bank, 131 Minn. 435, 155 N. W. 619; Patmont v. International C. M. Ass'n, 142 Minn. 147, 171 N. W. 302.

It seems quite clear that, in consequence of an error of the bookkeeper in failing to charge him with a payment previously made, plaintiff had been paid more salary than was actually due him. Burns and Rogers insisted that he should return the overpayment. During the discussion it appeared from plaintiff's own statement that in his expense account he had charged defendant with larger amounts paid for meals than he actually paid for them. He claimed, however, that he had the right to do this so long as the amounts charged did not exceed the amounts which he was allowed to spend for such purpose. These facts appear from his own testimony. The defamatory language is claimed to have been used during this discussion which according to plaintiff, became somewhat heated. It took place in the private office of the manager, and the only persons present were the plaintiff and Burns and Rogers. Burns and plaintiff were entire strangers, never having met before. We think that plaintiff failed to sustain the burden of proving that, in making the statement, Burns was actuated by ill-will and malicious motive, or that he made it causelessly and wantonly for the purpose of injuring plaintiff in his feelings or character. It was a remark made on a privileged occasion, to plaintiff himself, during a heated dispute, and there was some foundation for the charge.

There was evidence that the statement was overheard by other employes of defendant in adjoining rooms; but the conversation being privileged, the fact that it was incidentally overheard by persons in an adjoining room was not a publication of the nature or extent which would remove it from the protection of the privilege.

Hebner v. Great Northern Ry. Co., 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387.

Order affirmed.

NOTE.—*Conversation Overheard by Third Person as Affecting Privilege Within Law of Slander.*—In a note on this subject in Ann. Cas. 1917E, 699, it is said: "It is generally held that where slanderous statements are made by one in good faith to another, in order to protect the speaker's interests, or the corresponding interests of another, in a matter in which both parties are concerned, the qualified privilege attaching thereto is not defeated by the fact that such statements are incidentally overheard or brought to the notice of third parties who are not immediately interested in the matter." Among others, the following cases are cited: Southern Ice Co. v. Black, 136 Tenn. 391, 189 S. W. 861, Ann. Cas. 1917E, 695; Morton v. Knipe, 128 App. Div. 94, 895, 112 N. Y. Supp. 451, 455; Brown v. Globe Printing Co., 213 Mo. 611, 112 S. W. 462, 127 Am. St. Rep. 627; Fahr v. Hayes, 50 N. J. L. 275, 13 Atl. 261; Fresh v. Cutter, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67; Sheftall v. Central of Georgia R. Co., 123 Ga. 589, 51 S. E. 646; Conrad v. Roberts, 95 Kan. 180, 147 Pac. 795, L. R. A. 1915 E, 131; Philips v. Bradshaw, 167 Ala. 199, 52 So. 662.

The imputation of unchastity to a woman by her physician and in the presence of a third person who was there by the special procurement of the plaintiff, was held to be privileged. Bruce v. Curtis, 38 App. Cas. (D. C.) 304, Ann. Cas. 1913 C, 1070, 38 L. R. A. (N. S.) 69.

There is no privilege, however, if the defendant purposely selects an occasion to make the slanderous statements when a third person is present. Kruse v. Rabe, 80 N. J. L. 378, 79 Atl. 316, 33 L. R. A. (N. S.) 469; Field v. Bynum, 156 N. C. 413, 72 S. E. 449.

While statements made by the defendant at a shareholders' meeting were privileged, the privilege was lost by the presence of reporters who were there by defendant's express invitation. Parsons v. Surgey, 4 F. & F. (Eng.) 247.

So, statements made by an attorney to his client in such a loud tone of voice in a semi-public place within the hearing of third persons, were not privileged. Kruse v. Rabe, 80 N. J. L. 378, 79 Atl. 316, 33 L. R. A. (N. S.) 469.

CORRESPONDENCE.

ANSWER TO "A LEGISLATIVE PUZZLE."

Editor Central Law Journal:

I have read in your Journal of August 12, 1921, the article entitled "A Legislative Puzzle," and solve it thus. The five districts, each of them, must be laid off in triangular form, the sharp angles meeting at a central point.

If counties or districts are adjoining when they touch only at their corners, the cities of New Mexico can, and must be, districted as above suggested.

An old lawyer of this city said to me when the puzzle was presented to him: "I have seen somewhere in the books one or more judicial dcisions, construing a statute on the subject of the change of venue of suits, the statute requiring the change to be from the county where suit brought to "an adjoining" county, holding that two counties are "adjoining" when their corners merely touch, like this

County A	County B
County D	County C

Under such decisions Counties B and D are adjoining counties. The courts must hold the New Mexico Statute to have some meaning and be capable of execution if it be possible to do so, and the districts of cities in that State can be districted as above stated, since the districts are not required to contain the same area.

Puzzle No. 2 it seems to me, may be solved by having the names of candidates residing in each district designated on the election tickets and requiring each elector to vote for only one and only one candidate, for each district.

Yours truly,

FULTON THOMPSON.

Jackson, Miss.

HUMOR OF THE LAW.

"Here, boy," said the man to the boy who was helping him drive a bunch of cattle, "hold this bull a minute, will you?"

"No," answered the boy. "I don't mind bein' a director in this company, but I'm darned if I want to be a stockholder.—*Cartoons.*

A pompous old gentleman was addressing a gathering of English workmen, and during his remarks he urged them to "be industrious, shun indolence, and remember that sloth is the parent of necessity."

As he paused to let this sink in a man in the rear sang out: "Look 'ere, mister, I've 'eard it said as 'ow necessity is the mother of invention. If so be as it is, then sloth is invention's grandmother, and summat's wrong somewhere."—*Boston Transcript.*

An anecdote the late Chief Justice White told about himself was to the effect that, when he was a rising young lawyer, or perhaps the best-known young lawyer in New Orleans, one of the Judges asked him to defend a man who was unable to retain counsel. Mr. White made a plea for his client, who promptly got a sentence of two years at hard labor. As they were going out of the courtroom a friend of the client said:

"Say, Jim, have you got any money?"

"If I had had any money, don't you suppose I would have employed a lawyer?" replied Jim.

A story of Lincoln's early political life is told in John Wesley Hill's new book, "Abraham Lincoln, Man of God." It seems that in 1846, during a canvass for Congress, Lincoln attended a preaching service of Peter Cartwright's. Cartwright called on all desiring to go to heaven to stand up. All arose but Lincoln. Then he asked all to rise who did not want to go to hell. Lincoln remained still seated. "I am surprised," said Cartwright, "to see Abe Lincoln sitting back there unmoved by these appeals. If Mr. Lincoln does not want to go to heaven and does not want to escape hell, perhaps he will tell us where he does want to go?" Lincoln slowly arose and replied, "I am going to Congress."—*Christian Register.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Aliens**—Deportation.—The deportation of an alien who is found in the country in violation of law, or of the conditions prescribed by Congress, either as to his right to be admitted or his right to remain, is not a deprivation of liberty without due process of law.—In re Kosopud, U. S. D. C., 272 Fed. 330.

2. **Army and Navy**—Moratorium Act.—That the federal act is not applicable, even though it be assumed that the plaintiff's equity of redemption was suspended during the period of his military service and for three months thereafter, for the reason that such equity of redemption thereafter fully expired before the institution of the present action, and without any alleged offer or tender made to redeem.—Olson v. Gowan Lenning Brown Co., N. D., 182 N. W. 929.

3. **Bankruptcy**—Assignment to Trustee.—The property of a bankrupt comes to the bankruptcy court in legal effect from him, though he had previously assigned it to a trustee for the benefit of his creditors, so that he can claim exemption in such property under the Bankruptcy Act, notwithstanding his previous transfer of it to the trustee for his creditors.—In re Dautz, U. S. D. C., 272 Fed. 349.

4.——False Property Statement.—The fact that the bankrupt made a statement of his property, which was admittedly false, in order to obtain credit, does not prevent discharge, where the District Court found on sufficient evidence that the statement was not fraudulently made, but was negligently made to one who had full knowledge of the bankrupt's affairs, and who prepared the statement, which was signed by the bankrupt without reading it.—In re Matthews, U. S. C. C. A., 272 Fed. 263.

5.——Powers of Liquidators.—Where a corporation had appointed two stockholders as liquidators to settle its affairs, on dissolution under Acts La. 1914, No. 267, and the provisions of its charter, which did not purport to give the liquidators powers different from those conferred by the statute, the action of the liquidators in thereafter applying to the court for qualification as judicial liquidators is not an act of the corporation, so that an adjudication of bankruptcy cannot be based on such act, where the appointment of the liquidators by the corporation occurred more than four months before the filing of the petition for involuntary bankruptcy.—Standard W. & C. Co. v. George H. M'Fadden Bros. Agency, U. S. C. C. A., 272 Fed. 251.

6. **Banks and Banking**—Cable Transfer.—Where defendant bank sold to plaintiff a cable transfer of 7,000 marks to plaintiff's relative in Poland, the money paid became at once the property of the bank, which was under obligation to plaintiff to pay the agreed equivalent in foreign exchange of the amount received by it to the payee named in the cable transfer.—Safian v. Irving Nat. Bank, N. Y., 188 N. Y. S. 393.

7.——Fiduciary Relation.—In a controversy between a widow and a bank, wherein the bank claimed that it was entitled to the proceeds of life policies on decedent's life, held, that the circumstances and situation of the bank officers and the widow constituted a relation of trust and confidence which imposed upon the bank and its representatives the duty to deal with the widow with utmost frankness, and to inform her that a transfer by another bank of its rights in the insurance policies was without legal force and vested no right or interest to the policy, and cast upon the bank the burden of showing that undue advantage was not taken of the widow in obtaining an assignment from her.—Marsh v. Elba Bank & Trust Co., Ala., 88 So. 423.

8.——Return of Consideration.—Where defendant trust company undertook to establish by mail a credit for plaintiff, a resident of Germany, within a reasonable time, to the extent of the equivalent in German exchange of $750, but defendant trust company, by reason of war conditions, failed to perform, plaintiff is entitled to have a return of the consideration, with interest; her recovery not being limited to the present value in United States currency of the marks purchased.—Pfotenhauer v. Equitable Trust Co., N. Y., 188 N. Y. S. 464.

9. **Bills and Notes**—Assignment.—The fact that the assignee of certain notes and mortgages took the same with notice of his assignor's contract to build an apartment house on the mortgaged lots, in consideration of the notes and mortgages, did not charge him with the assignor's willful neglect to complete the building according to agreed plans and specifications.—Stephens v. Doxey, Utah, 198 Pac. 261.

10.——Attorney's Fee.—A holder of a note, providing for an attorney's fee if collected by legal process, is not entitled to the fee or so much of the note as was collected by him from the estate of a deceased maker, where it does not appear that such collection was obtained through legal proceedings in which services of an attorney were required.—In re Harris, U. S. D. C., 272 Fed. 351.

11.——Holder in Due Course.—Where the maker of a note delivered it to the payee under an agreement that the payee would increase its capital stock and sell agricultural implements to the maker at a reduction, but the stock was not increased, and the maker received nothing for the note, which was indorsed to a third party in payment of an indebtedness of the payee, the indorsee having no knowledge of the circumstances, held, that the indorsee was a holder in due course under Rev. St. 1919, §§ 838 and 843, and had executed the note for value under sections 812 and 814.—Swift & Co. v. McFarland, Mo., 231 S. W. 65.

12.——Holder for Value.—The discount of a trade acceptance and deposit of the amount thereof to the credit of the drawer does not make a bank holder for value, and protect it from defenses existing between the drawer and acceptor, where, in event of failure to pay the acceptance, the amount will be charged back against the drawer's account.—Sobel v. Engels, N. Y., 188 N. Y. S. 436.

13. **Brokers**—Recovery of Purchase Price.—Owner, who exchanged land in part payment for other land after inspection of the other land, and who was apparently satisfied with the transaction until his discovery that his brokers who effected exchange had been permitted by other party to transaction to retain a portion of the purchase price in addition to the commission paid him by such owner, could not recover the portion of the purchase price so received by the brokers on ground that they misrepresented the value of the land, where there is no proof of the value of either property or the price of the land received in exchange, and it appears that all negotiations had to do with the trade price between him and the brokers.—Terry v. Stephens, Mont., 198 Pac. 360.

14. **Burglary**—Chicken House a "House."—Under Pen. Code, § 459, defining burglary, a chicken house, used for housing chickens, is a "house" within the statute; and it was imma-

terial that it may have been attached to skids so that it could be moved.—People v. Coffee, Cal., 198 Pac. 213.

15. **Carriers of Goods**—Owner's Risk.—The uniform bill of lading approved by the Interstate Commerce Commission, providing that property destined to, or taken from, a station at which there is no regularly appointed agent shall be at the owner's risk after unloading or until loaded, and when received or delivered on private or other sidings, shall be at owner's risk until the cars are attached to and after they are detached from trains, does not apply to loaded cars on a public or semi-public siding, or one privately used, but owned by the railroad, at a station at which there is an agent, and they are not at the risk of the shipper where a bill of lading has been issued.—Yazoo & M. V. R. Co. v. Nichols & Co., U. S. S. C., 41 Sup. Ct. 549.

16.——Proof of Weight.—Proof of weights of grain before and after shipment, when shown to have been carefully made and with proper apparatus, is presumptively correct, but, where the railroad company introduces evidence of mistakes, or other evidence tending to impeach the accuracy or reliability of the weights, or of the record of the weights made, the question of the correctness of the weights is for the jury and is a fact which the shipper must prove by a preponderance of the evidence.—Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., Neb., 182 N. W. 967.

17. **Carriers of Passengers**—Loss of Baggage.—Where a carrier accepts as baggage the sample trunk of a traveling salesman with knowledge of its character, loss of time and inability to make sales because of delay in receiving trunks containing samples, and necessary and reasonable traveling expenses incurred in looking for the trunks or procuring other samples, will be regarded as within the contemplation of the carrier when it receives and checks traveling salesman's sample trunks as baggage, so as to entitle such salesman to recover damages therefor, in case of such delay.—St. Louis-San Francisco Ry. Co. v. Freeman, Okla., 198 Pac. 298.

18. **Commerce**—Interstate.—Where grain was shipped from Missouri to a point in Texas, and the Texas purchaser, on paying the draft with bill of lading attached, sold the grain to a purchaser in another part of Texas, and defendant railroad company before arrival of the shipment issued a bill of lading for transportation to the new destination, that shipment was interstate.—Missouri, K. & T. Ry. Co. of Texas v. Plano Milling Co., Tex., 231 S. W. 100.

19. **Constitutional Law.**—Authority Over Cable Landings.—The President is without constitutional power, in the absence of authority from the legislative department, to prohibit the landing of a submarine cable from a foreign country on the coast of the United States or otherwise making connection with its internal telegraph system, and, conceding that Congress by long acquiescence has impliedly given authority to the Executive to prevent the landing of a cable by a foreign corporation, such authority does not extend to the case of a domestic company having a federal franchise under Post Roads Act July 24, 1866, and which has for many years operated internal telegraph lines and the cables between Florida and Cuba constructed by express provisions of Act May 5, 1866, and over which Congress has at various times exercised its authority, directly and through the Interstate Commerce Commission, in regulating its rates over both its internal lines and its cable connections.—United States v. Western Union Telegraph Co., U. S. D. C., 272 Fed. 311.

20.——Distribution of Income Tax.—St. Mass. 1919, c. 314, providing for the distribution of the income tax collected by the state among the local subdivisions thereof in increasing percentages, and after a few years entirely, in proportion to the amount of the state tax imposed upon each, regardless of the amount of the income tax collected from each, does not deny a taxpayer due process of law or equal protection of law, guaranteed by Const. Amend. 14, though he resided in a town which will receive a smaller proportion of the income tax collected therein than will other towns.—Dane v. Jackson, U. S. S. C., 41 Sup. Ct. 566.

21.——Road Improvement.—An assessment by a road improvement district against a railroad made without any designated basis while other land in the district was assessed on the basis of area and position is so palpable and arbitrary a discrimination as to deny the railroads the equal protection of the laws, especially where the assessment against less than 10 miles of railroad for the construction of 11 miles of highway amounted to a sum greater than any probable, or even possible, benefits could amount to.—Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 6, U. S. S. C., 41 Sup. Ct. 604.

22. **Contracts.**—Compliance With.—Where, at the time power company agreed to install an electric sign in front of a moving picture theatre, there was a pole and power line or cable on the sidewalk in front of the theatre, the theatre had no legal right to terminate the written contract because the power company refused to make a requested change in the location of the pole and power line or cable in order to place the sign in a certain position, unless previously agreed upon.—Paldanius v. Strauss, Ore., 198 Pac. 253.

23. **Corporations.**—"Laches."—In an action to rescind a contract for the sale of stock in a corporation, where it appears that plaintiff continued her efforts to surrender the stock and recover the money paid therefor for a period of three years, though not in form amounting to a legal demand, held, that the testimony does not support a finding that plaintiff was guilty of laches.—Ricker v. J. L. Owens Co., Minn., 182 N. W. 960.

24. **District of Columbia.**—Vault Under Sidewalks.—Where, in 1884, an application was made by an abutting owner for a permit to erect a building with adjacent vaults under the sidewalk, and the vault was constructed and used ever since, but no formal permit appears in the record, a license to construct and use the vaults, revocable at will, is all that can be inferred against the public.—District of Columbia v. R. P. Andrews Paper Co., U. S. S. C., 41 Sup. Ct. 545.

25. **Divorce.**—Final Judgment.—A final judgment in an action for divorce cannot be vacated on the ground that the defendant failed to answer through mistake or excusable neglect.—Johnson v. Union Inv. Co., Minn., 182 N. W. 955.

26.——Drunkenness.—In a husband's suit for divorce for habitual drunkenness, the fact that plaintiff husband brought home beer for family use would not justify the giving of instructions that he caused or consented to the habitual drunkenness of his wife through the use of whiskey.—Dorian v. Dorian, Ill., 131 N. E. 129.

27. **Eminent Domain.**—Value of Lands.—Owner of land condemned is entitled to the value of the land for the most profitable use it was available at the time the petition was filed, but this availability does not refer to a future possibility, but to a present capacity for a use which may be anticipated with reasonable certainty and made the basis of an intelligent estimate of value, and its availability for future uses must be such as enter into and affect its market value, and regard must be had to the existing business or wants of the community or such as may be reasonably expected in the immediate future.—Forest Preserve Dist. v. Kean, Ill., 131 N. E. 117.

28. **Equity.**—Laches. — Laches shown on the face of the bill can be taken advantage of by demurrer. —O'Brien v. O'Brien Mass., 131 N. E. 177.

29. **Executors and Administrators.**—Conveyance of Land.—Where one who has agreed to sell land died before executing a conveyance, and the purchaser makes an agreement with the administrator whereby the latter bound himself to obtain a good and valid conveyance, but was not acting on behalf of the other heirs, who knew nothing about the agreement, such agreement was not binding on decedent's estate.—De Profit v. Heydecker, Ill., 131 N. E. 114.

30.——Insufficient Bond.—When an administrator is given license in the district court to sell land for the payment of debts and the court orders him to give a bond to account for the proceeds of the sale, after the sale is confirmed, from which no appeal is taken, and the property is in the hands of a good-faith purchaser, an objection that the sale bond was insufficient, because the penalty of the bond ap-

pears to have been left blank, will not invalidate the sale, where the bond may be reformed in equity and a remedy had thereon.—Pohienz v. Panko, Neb., 182 N. W. 972.

31. **Explosives.**—Reasonable Care.—While a town superintendent of streets had a right to work a quarry leased by the town to obtain material for making or mending the public ways, he was bound to prevent fragments of rock from falling or being thrown on plaintiffs land, and to take every reasonable precaution that the blasts should not be so violent and successive as to shake or materially injure plaintiff's house. —Stevens v. Town of Dedham, Mass., 131 N. E. 171.

32. **Frauds, Statute of.**—Breach of Contract. —In an action of general assumpsit with a special complaint for damages for breach of contract for sale of certain standing timber and pulpwood, plaintiff offering in evidence a writing signed by himself, but not by defendants, whereby he sold them certain timber for pulpwood and giving them six months to remove it, such writing was admissible, though such contracts are for sale of an interest in land and required by the statute to be in writing and signed by the parties to be charged; the particular writing having become binding as fast as it became executed by defendant's severing the trees.—Ross v. Hamilton, Vt., 113 Atl. 781.

33.——Brokers' Bought and Sold Slips Admissible.—Where brokers' bought and sold slips, evidencing sales of cotton for future delivery, gave the address of the party to be charged, and there was testimony that, when each bought slip was signed, a corresponding sold slip was signed by the party to be charged thereby, and that when each sold slip was signed a corresponding bought slip was signed, the slips were admissible, under Cotton Futures Act, §§ 4, 5 (Comp. St. §§ 6309d., 6309e), requiring contracts to be in writing and to give the names and addresses of the seller and buyer.—Gettys v. Newburger, U. S. C. C. A., 272 Fed. 209.

34. **Insurance.**—Cancellation. — Where, because of the promise of local agents of a fire insurance company to cancel insured's policy covering certain household goods, insured procured other insurance, and the local agents failed to make the promised cancellation, but, after a fire destroying the goods, informed the insured that he had "some loss" under the policy, the company was estopped to assert as a defense that the insured had procured other insurance, the company issuing the other policy having paid only one-half the amount thereof, on the ground of the existence of the insurance sued for.—Clark v. Fidelity-Phenix Fire Ins. Co. of New York, Mo., 231 S. W. 74.

35.——"Combat."—Stipulation that there should be no liability if insured died as result of "combat" precluded recovery on insured's death while engaged in combat only if the insured brought on the difficulty and encounter in which he met his death.—Eminent Household of Columbian Woodmen v. Payne, Ala., 88 So. 454.

36.——Conditions in Policy.—A condition in an insurance policy that, if insured's death occurred within six calendar months from its date, the beneficiary would receive only one-half of the amount mentioned therein, and the full amount if death occurred thereafter, contravened Rev. St. 1911, art. 4742, subd. 3, providing that no life insurance policy shall contain any provision for settlement for less than the amounts insured on the face of the policy, plus dividend and less indebtedness and premiums.—American Nat. Ins. Co. v. Dixon, Tex., 231 S. W. 165.

37.——Proximate Cause of Injury.—If diabetes was an effect of insured's accidental injury, a mere link in the chain between the accident and its effect, the condition of insured would be attributable to the accidental injury, and not the disease.—Anderson v. Mutual Benefit Health & Accident Ass'n, Mo., 231 S. W. 75.

38. **Intoxicating Liquors.** — Accomplice. — Where the prosecuting witness and another, discovering that defendant was not at home, found him in another place, and defendant, in response to an inquiry as to where the prosecuting witness could procure whisky, stated that he had a cotton picker who could furnish liquor, etc., but defendant was not present at the sale, he is not guilty as a principal, for he was not present, he did not keep watch, he did not assist in the unlawful act, he did not endeavor to secure the safety or concealment of the sellers, he did not employ an innocent agent, and he did not advise or agree to the commission of the offense.—Chandler v. State, Tex., 231 S. W. 105.

39.——Admissibility of Evidence.—Where one is charged with having in his possession intoxicating liquor with the intent of violating the prohibitory law, the general reputation of his place of business as being a place where intoxicating liquors were sold may be shown upon the laying of a proper predicate for the introduction of such testimony.—Friedman v. State, Okla., 198 Pac. 350.

40.——Excess Tax.—A holder of a liquor tax certificate issued pursuant to the provisions of Liquor Tax Law, § 8, subd. 2, who filed a return under section 9-a, subd. 4, of such law, added by Laws 1917, c. 623, and erroneously included therein tax receipts which were exempt from the imposition of said tax, and paid the tax as computed and assessed on the erroneous return voluntarily under a mistake of law, without coercion or duress, cannot recover the excess.—Brotherhood Wine Co. v. State, N. Y., 188 N. Y. S. 490.

41.——Illegal Use of Automobile.—In state's action to condemn automobile used in transportation of prohibited liquor by person other than owner, owner interposing claim thereto, was required to allege that he could not, by reasonable diligence, have obtained knowledge or notice of the illegal use of the car.—Glover v. State, Ala., 88 So. 437.

42.——Volstead Act.—National Prohibition Act, which was intended to prevent the distilling of spirits for beverage purposes, and which impose on any person violating the act a penalty of fine and imprisonment, and also double the tax theretofore imposed by existing laws with an additional specific penalty, manifests an intention to prescribe the full penalty for unlawful distilling, and repealed Rev. St. § 3257, making it an offense to defraud the United States of a tax on spirits by one carrying on a business of a distillery, in so far as it relates to distilling for beverage purposes, notwithstanding the provision of section 35 of the Prohibition Act that the act does not relieve any person from liability, civil or criminal, incurred under existing laws.—United States v. Yuginovich, U. S. S. C., 41 Sup. Ct. 551.

43. **Landlord and Tenant.**—Insufficient Rent. —A rent of $35 a month held not a reasonable rent from the owner's viewpoint considering taxes, repairs, insurance, and allowance of 5 per cent. interest on the purchase price.—Stein v. Eckert, N. Y., 188 N. Y. S. 469.

44.——Termination of Lease.—Where United States Housing Corporation Incorporated, leased premises under a contract wherein lessee agreed to move at any time on 30 days' notice, it was no defense to proceedings by the corporation to have the lessee removed that the lessor's purpose in terminating the lease was to obtain a greater rental, notwithstanding Act Cong. July 19, 1919, and Laws N. Y. 1920, cc. 136, 139.—Application United States Housing Corporation, N. Y., 188 N. Y. S. 365.

45.——Unreasonable Rent.—In action for rent under lease made after Laws 1920, c. 136, became effective, in which it appeared that the rentals were substantially increased over the rentals as they existed one year prior to the dates of the leases, the tenant was entitled to the presumption that the lease was unjust, unreasonable, and oppressive, though it was executed prior to the time when chapter 944, § 3, amending such statute, became effective, since the statute in its unamended form gave the tenant the benefit of such presumption.—Lewine v. Weil, N. Y., 188 N. Y. S. 385.

46. **Master and Servant.**—Sunstroke.—In a proceeding under the Workmen's Compensation Act for the death of an employee, who suffered a sunstroke while delivering a load of coal, where there was no evidence that, while engaged in delivering coal, he was peculiarly exposed to the danger of sunstroke by reason of the nature of the work, a finding that the claimant had not satisfied the burden of proving that the employee by reason of his employment was subjected to materially greater danger of sunstroke than other outdoor workers was not unsupported by evidence as a matter of law.—Dougherty's Case, Mass., 131 N. E. 167.

47. **Municipal Corporations.**—Damages by Mob.—Rev. Laws, c. 211, § 8, making cities and

towns liable for three-fourths of the value of property destroyed or injured by persons riotously or tumultuously assembled naturally imports the physical existence of a tangible thing, which may be the subject of property, and does not apply to a theft of the property which is only an injury to the owner's possessory right, and not an injury to the property.—Yalenezian v. City of Boston, Mass., 131 N. E. 220.

48.——Discretion of Officers.—A court of equity cannot properly interfere with, or in advance restrain, the discretion of a board of city commissioners, while such board, in the exercise of powers conferred by the charter or general laws, is considering a proposition as to whether certain streets and alleys in the city are to be paved.—Hufford v. Flynn, N. D., 182 N. W.

49.——Discretionary Powers.—When sweeping the streets, a municipality is exercising its discretionary powers to protect the public health and comfort, and not performing a special corporate or municipal duty to keep them in repair, and therefore it is not liable for the negligent acts of its employees engaged in sweeping the streets.—Harris v. District of Columbia, U. S. S. C., 41 Sup. Ct. 610.

50.——Sidewalks.—It is the duty of a municipality to keep and maintain the entire width of its sidewalks in a reasonably safe condition for public travel and a failure on the part of the municipality to use ordinary care in that respect after notice of a sidewalk's unsafe condition or when by the exercise of ordinary care it could have had knowledge of the defective condition of the walk will render the municipality liable if sufficient time has elapsed after notice, etc., for the municipality to have remedied the condition.—City of Newport v. Schmit, Ky., 231 S. W. 54.

51. **Oils and Gas.**—Impairment of Obligation.—If an oil and gas company was not a public utility at the time of contracting with smelting companies to furnish them gas giving such smelting companies prior call on supply, and the contracts were not entered into in anticipation of the gas company becoming such a public utility, but were merely private undertakings concerning a subject-matter over which the state had no control, the contracts were valid, and the obligations thereof could not be impaired by any state regulation.—Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co. Ark., 230 S. W. 897.

52 **Parent and Child.**—Support.—The father of a minor, whom he has emancipated, is not thereby relieved from the obligation to support an indigent child.—Hendriksson v. Town of Queen, N. D., 182 N. W. 953.

53.—**Physicians and Surgeons.**—Error of judgment.—If a regularly licensed physician with reasonable diligence employs the skill of which he is possessed in treating a surgical case, he is not liable for an error of judgment, and the fact that the patient dies is not evidence of neglect.—Emerson v. Lumbermen's Hospital Ass'n, Ore., 198 Pac. 231.

54. **Post Office.**—Contract for Carrying Mails.—A contract between a railroad company and the Post Office Department for the carrying of the mails, which was made after express notice by the department that the railroad would be subject to all the postal laws and regulations, which were then or might become applicable during the term of the service, is subject to a readjustment of the compensation under a statute enacted after the contract was made, especially where the readjustment was made because of the discontinuance by the railroad of an important item of the services on which the compensation was computed.—Missouri, K. & T. Ry. Co. v. United States, U. S. S. C., 41 Sup. Ct. 617.

55. **Railroads.**—Use by Public. — Where the public generally, with the knowledge and acquiescence of a railroad company, have continually used its tracks as a footpath for a long period of time, the presence of persons on the tracks must be anticipated, and it is the company's duty to give warning of the approach of trains and to operate them at a reasonable rate of speed, maintaining proper lookout, and, unless signals are given, an engineer has no right to assume that a person with his back to the train knows of its approach.—Hines v. Wilson's Adm'x, Ky., 231 S. W. 23.

56. **Replevin.**—Value of Property.—At common law an action in replevin tests only the right of possession of the replevined property at the time of the commencement of the action and the value of the property is immaterial, so that it is not necessary, in the absence of a statutory requirement, that the value of the property be found separate from the damages awarded defendant for the taking of the same under the writ.—Quinlan v. Jones, Wyo., 198 Pac. 352.

57. **Sales.**—Contract.—Defendant's letter to plaintiff offering to sell the waste products of its mill for the following year at prices therein stated and plaintiff's answer that the arrangements in defendant's letter were satisfactory constituted a contract between the parties.—Reliable Waste Co. v. Waterhead Mills, Mass., 131 N. E. 215.

58. **Statutes.**—Excise Tax.—The provisions of Laws, N. M. 1919, c. 93, requiring an annual license tax from distributors of gasoline and prohibiting any sales of gasoline until the tax had been paid, are not separable as to domestic and interstate distributors, and therefore the assessment and collection of license tax will be restrained as to all dealers, notwithstanding the statement by the state officers that they did not intend to collect from dealers whose transactions were entirely interstate.—Bowman v. Continental Oil Co., U. S. S. C., 41 Sup. Ct. 606.

59. **Sunday.**—Notice of Injury.—Notice to the mayor of a city of the first class of an accident on a defective sidewalk is not in any sense legal process, under Rev. St. 1919, § 1211, declaring that the service of every such writ on Sunday shall be void; hence, where such notice was received on Sunday, but the 60-day period within which notice was required to be given by Rev. St. 1919, § 7955, did not expire with Sunday, but there yet remained several secular days, the notice is in time and should be considered, for the mayor had it on the following Monday.—Thomas v. City of St. Joseph, Mo., 231 S. W. 63.

60. **Taxation.**—Exemptions.—Tax Law, §§ 351, 352, 357, 359, imposing a tax based on a person's net income, held not unconstitutional in so far as it provided for the taxation of interest on real estate mortgages, as against the contention that the taxation of such income impaired the obligation of the state's contract with mortgagees created by section 251, exempting "mortgages" on which recordation tax is paid from other taxation "by the state, counties, cities, towns, villages, school districts and other local subdivisions of the state," since it is only the principal debt, and not the interest, that is exempted from taxation by section 251, in view of section 253, and in view of the purpose of such exemption, and since the income tax is not directly imposed on particular income, but is a tax on the individual, to be determined according to his net income, in view of sections 351, 357, 359, 360, 362.—People v. Wendell, N. Y., 188 N. Y. S. 344.

61. **Telegraphs and Telephones.**—Delay.—In an action against a telegraph company to recover the penalty provided for delay in delivering a telegram, where it appeared that at the time telegraph companies were under federal control, held, that a demurrer to plaintiff's evidence should have been sustained.—Taylor v. Western Union Telegraph Co., Mo., 231 S. W. 78.

62. **Trusts.**—Speculation.—A trustee is not permitted to buy and sell bonds on speculation and the fluctuations in market value after purchase by the trustee are merely changes in the value of the assets of the trust estate, which are to be wholly disregarded in any accounting between life tenant and remaindermen for funds from the trust estate invested in income-bearing property.—In Re Gartenlaub's Estate, Cal., 198 Pac. 209.

63. **United States.**—Unauthorized Improvement.—Act June 25, 1910, Act Feb. 27, 1911, and Act July 25, 1912, making appropriations for improving a harbor channel and for completing the improvement, did not authorize the Secretary of War to contract for the completion of the improvement at a cost exceeding the amount appropriated, especially in view of Rev. St. §§ 3732, 3733, 5503, denying authority to make contracts on behalf of the United States in excess of appropriations therefor.—Sutton v. United States, U. S. S. C., 41 Sup. Ct. 563.